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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* OLLE CARLBARK,  
KENNETH STRANNEMALM, and EWA KOLBY FALK

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Appeal<sup>1</sup> 2009-003804  
Application 09/529,638  
Technology Center 3700

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Decided: November 10, 2009

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Before DONALD E. ADAMS, LORA M. GREEN, and  
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

GREEN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 21-25.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> Oral Hearing held October 7, 2009.

<sup>2</sup> Claims 4-30 are pending, with claims 4-20 and 26-30 being indicated by the Examiner as being allowable (App. Br. 2).

## STATEMENT OF THE CASE

Claim 21 is representative of the claims on appeal, and reads as follows:

21. A garment comprising an absorbent part and two separate waist belts which have a longitudinal direction, a cross-direction, longitudinally extending edge parts and a longitudinally extending interior part that is arranged between the longitudinally extending edge parts, wherein said belts extend generally in said longitudinal direction, one end of each of the two separate belts is permanently fastened directly or indirectly to the absorbent part, and opposite ends of each of the two separate belts extend in respective directions from said absorbent parts and are adapted to be fastened together around a wearer of a garment, which belts have a stiffening material that forms a stiffness that varies in the cross-direction of the belts, wherein the stiffness that varies has an extension in the longitudinal direction, and wherein a piece at an end of at least one of the belts is free from stiffening material.

The Examiner relies on the following evidence:

New	H1440	May 2, 1995
Herrin	5,706,524	Jan 13, 1998

We affirm.

## ISSUE

The Examiner concludes that claims 21-25 are rendered obvious by the combination of New and Herrin.

Appellants assert that there is no reason to combine the references as suggested by the Examiner because New's belt has an arcuate design so that it is less noticeable when worn under clothes, and that design and purpose would be destroyed by incorporating into it the elastics of Herrin.

Thus, the issue on appeal is: Have Appellants demonstrated that the Examiner erred in combining the elastics of Herrin with the belt of New to arrive at the garment of claim 21?

#### FINDINGS OF FACT

FF1 The Examiner rejects claims 21-25 under 35 U.S.C. § 103(a) as being rendered obvious by the combination of New and Herrin (Ans. 3). As Appellants do not argue the claims separately, we focus our analysis on claim 21, and claims 22-25 stand or fall with that claim. 37 C.F.R. § 41.37(c)(1)(vii).

FF2 The Examiner finds that “New discloses all aspects of the claimed invention with the exception of stiffening elements.” (Ans. 3.)

FF3 New discloses a belt for use with an absorbent garment (New, col. 2, ll. 5-6). New teaches that the “belt is arcuate so that one laterally extending edge . . . is longer than the other laterally extending edge” to provide “a better fitting belt which more discretely conforms to the contours of the wearer and is less noticeable under clothing.” (*Id.* Abstract.)

FF4 Figure 6 of New is reproduced below.

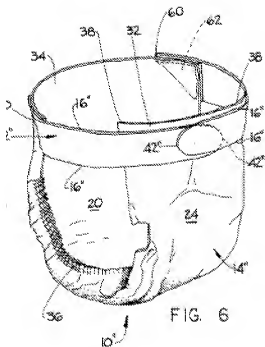


Figure 6 shows a perspective view of the absorbent garment of New (*id.* at col. 3, ll. 3-4).

FF5 Figures 9A and 9B of New are reproduced below.

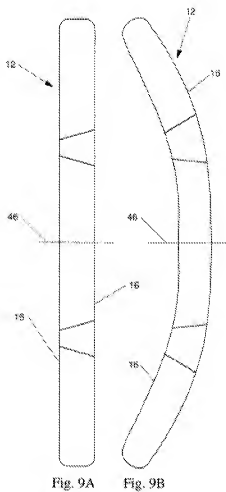


Figure 9A shows an embodiment of New, “in which a generally straight and rectangular belt is provided with pieces of elastic material in the shape of truncated triangle.” (*Id.* at col. 3, ll. 12-16.) Figure 9B shows “a top plan view of the belt shown in FIG. 9A which illustrates the manner in which the differential extensibility of the pieces of elastic provides the belt with one edge having a length greater than the other edge.” (*Id.* at col. 3, ll. 17-21.)

FF6 The Examiner relies on Herrin for teaching “a garment having waist belts 30 that have a stiffening material 33, as shown in figure 4, that varies in the cross-direction of the belts 30,” wherein the “stiffening material 33 is extensible in the longitudinal direction.” (Ans. 3.)

FF7 The Examiner finds that Herrin teaches that the belts of Herrin “provide good stretch and recovery characteristics, and are easy to attach.” (*Id.*)

FF8 Herrin teaches “a disposable undergarment waistband and a method of producing the waistband at high production speed that comfortably contacts the skin of [the] wearer.” (Herrin, col. 2, ll. 45-48.) Herrin teaches further that the waistband “has good stretching and recovery characteristics and . . . easily attaches and detaches to a disposable undergarment panel.” (*Id.* at col. 2, ll. 50-53.)

FF9 Figure 3 of Herrin is reproduced below.

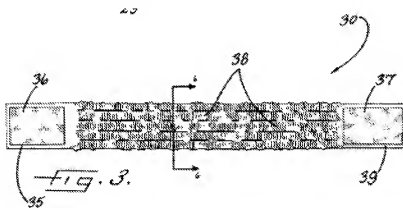


Figure 3 shows a top plan view of an undergarment waistband according to Herrin (*id.* at col. 4, ll. 63-65).

FF10 Herrin teaches that “it is also another object of the present invention to provide a less expensive disposable undergarment waistband that can be

readily produced in high volume” (*id.* at col. 2, ll. 54-56). Herrin teaches further that the “first and second layers, for example, can inexpensively be formed” (*id.* at col. 8, ll. 16-17).

FF11 The Examiner concludes that it would have been obvious to the ordinary artisan “to construct the garment of New with the waist belts of Herrin, to provide good stretch and recovery characteristics, and easy attachment.” (Ans. 3.)

### PRINCIPLES OF LAW

The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) secondary considerations of nonobviousness, if any. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007).

If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

*Id.* at 417. It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418. *See also*



*id.* at 421 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”).

In addition,

A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference’s disclosure is unlikely to be productive of the result sought by the applicant.

*In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

“The fact that the motivating benefit comes at the expense of another benefit ... should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another.” *Medichem S.A. v. Rolabo S.L.*, 437 F.3d 1157, 1165 (Fed. Cir. 2006).

## ANALYSIS

Appellants argue that the belt of New “is generally arcuate in shape and has a curvilinear length” that allows it to fit better and discretely conform to the contours of the user, making it less noticeable when worn under clothing (App. Br. 7 (citing New, col. 10, ll. 17-19)). Appellants assert that in contrast, Herrin “is concerned with a disposable undergarment waistband having elastic elements that is easily and economically produced.” (App. Br. 8.) Appellants argue further that the belts of Herrin

do not attach to each other, but to the upper peripheral portion of the undergarment panel, and the belts are purely rectangular in shape (*id.*).

Appellants argue further that there is no reason to combine the references as suggested by the Examiner (*id.*). Appellants assert that New's belt has an arcuate design so that it is less noticeable when worn under clothes, and that design and purpose "would be destroyed by incorporating elastics in it." (*Id.*) According to Appellants, the "purposes of *New* and *Herrin* are diametrically opposed and by modifying the belts shown in *New* to include the elastic strips of *Herrin* would defeat the advantages taught by *New*." (*Id.*) Appellants assert that as seen in Figures 7 and 8 of *Herrin*, the waistbands are not to be adapted to be fastened together around the waist of the user, and that even if one were to modify *New* using *Herrin*, they would have included the elastic strips in the waist portion, and not in the belt portion where they would be more conspicuous (*id.* at 9).

As to the embodiment as shown in Figure 9 of *New*, Appellants argue that the rectangular embodiment as shown in Figure 9A is actually meant to be arcuate when worn, as shown in Figure 9B (Reply Br. 5). According to Appellants, if the elastics of *Herrin* were incorporated into the belt of *New*, it would conflict with the elastics shown in the 9A/B embodiment of *New*, and would interfere with *New*'s purpose of having an arcuate belt (*id.*). In addition, Appellants assert, *New* already incorporates elastics, thus there would be no reason to incorporate the elastics of *Herrin* (*id.* at 6).

Appellants' arguments have been carefully considered, but are not convincing. Both *New* and *Herrin* teach a waistband for an absorbent undergarment, and thus both the waistband of *Herrin* and the belt of *New*

serve the same purpose, as do the elastic of New and the elastic of Herrin—to provide a comfortable fit to the wearer. While the arcuate shape provided by the elastics of New may serve the purpose of making the belt less noticeable when worn under clothing, it would be well within the level of skill of the ordinary artisan to weigh the advantages of the arcuate shape of the belt of against the advantages obtained the elastics used in the waistband of Herrin, which may be more economically produced.

While the waistbands of Herrin are not adapted to be fastened together around the waist of the user, the Examiner relies on New to teach that feature. Herrin was relied upon to teach that it was known to use elastics, as shown in Figure 3, in the waistband of a disposable undergarment, thus providing the stiffening elements required by claim 21. As to Appellants' argument that the ordinary artisan would have incorporated the elastic strips in the waist portion, and not the belt portion, New teaches a belt, and we find that in view of the disclosure of Herrin, it would have been obvious to the ordinary artisan to incorporate the elastics into any part of the belt of New, as well as to incorporate the elastics into the whole belt of New.

As to the embodiment shown in Figure 9 of New, while we agree that the belt as taught by New would assume an arcuate shape when worn, the elastics of Herrin, while arguably more conspicuous when worn under clothing, would also provide the comfortable fit of New, and as discussed above, Herrin provides evidence that the use of such elastics in a waistband or belt of a absorbent undergarment was well known to the ordinary artisan. Moreover, while Appellants argue that New already incorporates elastics so that there would be no reason to incorporate the elastics of Herrin, if we

were to accept that argument, it would essentially vitiate the obviousness analysis, as once a problem is arguably solved, there would be no further reason for any further modifications.

#### CONCLUSION OF LAW

We conclude that Appellants have not demonstrated that the Examiner erred in combining the elastics of Herrin with the belt on new to arrive at the garment of claim 21.

We thus affirm the rejection of claim 21 under 35 U.S.C. § 103(a) as being rendered obvious by the combination of New and Herrin. As claims 22-25 stand or fall with that claim, we affirm the rejection as to those claims as well.

#### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

dm

Appeal 2009-003804  
Application 09/529,638

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